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TRANSCRIPTS: United States v. Luna

Law Review Staff
Federal District Court for the District of Rhode Island

United States District Court,
District of Rhode Island.

UNITED STATES of America v. Dagoberto LUNA[1]

No. 03-111ML
Argued and Decided January 19, 2005
Government's Motion for Reconsideration and Correction of Sentence

19 JANUARY 2005 – 9:30 A.M.

THE COURT: This is the matter of the United States versus Dagoberto Luna. The matter is before the Court this morning on the Government's motion for reconsideration and correction of sentence.

Mr. Luna, so you'll understand, I know you were here last week and I imposed a sentence that I thought was an appropriate sentence. However, the Government has since filed a motion pointing out that the Court does not have the authority to impose a suspended sentence, which was part of the disposition I made in your case last week; and in an effort to correct that sentence, I scheduled the matter today for hearing.

So I am vacating the sentence imposed last week on the basis of the Government's motion indicating that the sentence I did impose, at least that portion that suspended a term of imprisonment, is not permissible under the current statutory scheme.

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1. Reconsideration and Correction of Sentence Hearing Transcript, United States v. Luna, No. 03-111ML (D.R.I. 2005) (Judge Mary Lisi presiding).

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THE COURT: Okay. Let's, then, start anew. This Defendant stands convicted by virtue of his admission of illegally reentering the United States after having been deported.

The probation officer in this case prepared a comprehensive pre-sentence investigation report which chronicles not only this Defendant's personal history but also a rather remarkable history of prior criminal offenses.

At the time that the pre-sentence investigation report was prepared, the Supreme Court had not ruled in the *Booker* and *Fanfan* cases. Accordingly, the probation officer under the prevailing law made a guidelines determination that this Defendant has a criminal history category of VI with a total offense level of 22, which provides for a guideline range of 84 to 105 months of incarceration.

As I read the *Booker* decision, primarily Justice Breyer's majority opinion, the guidelines themselves are no longer mandatory and controlling on the Court's sentencing authority. Rather, the guidelines have become advisory and are one item that the Court must consider in fashioning an individualized sentence.

The other change in the law that *Booker* works is that the standard on appeal is one of reasonableness, and so this Court's sentence will be measured on a reasonableness test rather than whether or not I have properly applied mechanically and mathematically the prior system that was in place.

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THE COURT: Okay. So let me hear from you, Mr. Lockhart [for the Government], on sentence.

MR. LOCKHART: Your Honor, as we pointed out in the memorandum in aid of sentencing, we believe, along with Judge Cassell of Utah,[2] that in order to meaningfully consult the guideline sentencing range as *Booker* requires and as the Sentencing Reform Act requires, it is, first of all, necessary to have a pre-sentence report prepared; and that's been done in this case.

In other words, without a GSR or guideline sentencing range,

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2. *See* United States v. Wilson, 350 F.Supp.2d 910, 911-25 (D. Utah 2005).

the Court has no benchmark to make a decision on whether it should follow the GSR, guideline sentencing range, or not.

So the PSR was prepared in this case. There were no – there was at one time an objection to the criminal history score calculation. That objection was withdrawn at the sentencing hearing, and so there is no dispute now that the total offense level is 22, criminal history category is VI.

So I think, along with Judge Cassell, you have to start from the premise that that guideline sentencing range is something that you should place, what Judge Cassell says, considerable weight on in arriving –

THE COURT: And, of course, Judge Cassell has no precedential affect here.

MR. LOCKHART: He doesn't.

THE COURT: Last I checked, he's a district judge out in Utah.

MR. LOCKHART: Correct, but we think that his opinion forecasts the likely First Circuit result in some fashion or another. We also think that it's a fair reading of the *Booker* opinion itself and the Sentencing Reform Act as well.

Remember that the Sentencing Reform Act, a provision which is still valid of that Act, says in 3553(a)(4), I believe, that the Court has to consult –

THE COURT: Well *Booker* doesn't say that we have to give heavy reliance on the guidelines. As I read the majority opinion, that is, the Breyer majority opinion, he says that the Federal Sentencing Act makes the guidelines effectively advisory. It requires a sentencing Court to consider guideline ranges, but it permits the Court to tailor the sentence in light of other statutory concerns as well with a reference to Section 3553(a).

MR. LOCKHART: Yes, but as Judge Cassell points out, the fact that you're required to consult the guidelines leaves open the question of what weight the Court should place on the guidelines.

We would agree that *Booker* doesn't directly address the question of what weight the Court is to place on the guidelines. I don't think it implicitly says the Court doesn't have to place much weight or that the Court has to place great weight. It leaves the question open.

And so the wisdom of Judge Cassell's decision, we think, is that he looked into the question of what weight was appropriate

and decided that it made sense to place considerable weight on the guideline range for a couple of reasons. First of all, the statutory factors –

THE COURT: What exactly does that mean, though, Mr. Lockhart?

MR. LOCKHART: Well, what it means is that the Court should begin from the presumption that the guideline sentencing range calculated by the pre-sentence report should be the appropriate range unless there is some unusual or exceptional feature in the case. That is the way we read it.

In other words, the Court should take that as the starting point and then decide whether, in light of the other statutory factors set forth in 3553, the Court should deviate from what or whether, for example, there's a basis for a downward departure or, conversely, an upward departure under the guidelines.

THE COURT: Are we really talking in terms of departures, though, and this is an issue I think *Booker* doesn't address, and that is the whole section of the guidelines on departures, when the Court says that the guidelines are no longer mandatory but rather advisory?

I'm not so sure that we're really stuck with a departure mode if the Court decides, for instance, in this case to sentence outside that guideline range.

MR. LOCKHART: Well, our view of it is that in order to meaningfully consult the guidelines, you have to go through the full range of guideline analyses, including any upward or downward departure requests made by the parties.

Now, after you determine what the guideline sentencing range is, we agree that, obviously, the Court still has flexibility because the guidelines are now advisory to impose a different sentence; but what is clear from the *Booker* decision is that the probation department is still supposed to prepare pre-sentence reports, the parties are still supposed to go through the process of objecting to that, and it makes sense that, consequently, the parties should also be in a position to brief the question of downward or upward departures.

I think it's only after the Court resolves sentencing objections and departure requests that the Court then needs to look at the question of is it going to deviate from the final guideline sentencing range. It's only through arriving at that final range –

THE COURT: Let me ask you this, Mr. Lockhart. I've read the decision out of Utah, and I'm not sure how one reconciles that approach with the standard of review that the Court announced in *Booker*.

The standard now is one of reasonableness. It's not whether or not the Court gave or relied heavily on the guidelines provision or even that the guidelines provision is to be considered a presumptively reasonable sentence.

So how do you reconcile the Court's pronouncement that the standard of review on appeal of the sentence, one the Court has applied 3553(a), and a portion of that obviously is a look at the guidelines themselves, how do you reconcile that?

I mean, granted, it would be very easy for this Court to simply say, as I think the Court in Utah seemed to be saying, Well, what *Booker* really means is the guidelines aren't mandatory anymore, but the right way to do it is the apply guidelines. I'm not so sure that's what *Booker* requires.

MR. LOCKHART: Well, the way to reconcile it is this way, your Honor. First of all, we disagree with the position that the reasonableness standard is the primary light by which this Court must be guided. It's the standard of review on appeal. *Booker* makes clear you have to consult the guidelines. The only way to do that is to actually find out what the guideline sentencing range is and then explain why you're not following it in a given case. Remember, there is the Feeney Amendment which requires an explanation –

THE COURT: Oh, I remember the Feeney Amendment.

MR. LOCKHART: – an explanation for deviating from the GSR. That provision was left on the books, it wasn't really affected by *Booker*, and so what that suggests is that the Court has to sort of start with the presumption that the guideline sentencing range is an appropriate starting point and then work from there and explain why it's deviating from that range.

Now, on appeal, the Court of Appeals will apply a reasonableness standard, but I'm quite confident that it will be fleshed out when the First Circuit and other circuits get is so that there will be more to it than just a sort of I-like-it-when-I-see-it kind of reasonable standard on appeal. I assume, along with – I think Justice Scalia may have made this point in his dissent, that the Courts will enact more of an analytical standard than that on

appeal and that what we'll be left with is a rule which says that a sentence within the guideline sentencing range is presumptively reasonable absent some extraordinary circumstances; a sentence that's outside the guideline sentencing range, while it might not be presumptively unreasonable, is going to be deserving of further scrutiny by the Court of Appeals.

They will take a closer look at that sentence, and they will expect, consistent with the Feeney Amendment, an explanation from the Court on how it arrived at that sentence.

Now, I think, practically speaking, the Government is not going to take every single one of these cases up before the First Circuit on an unreasonableness theory. It will have to pick and choose of necessity, and so what I expect is you will begin to see before the First Circuit cases where there's just such a yawning gap between the guideline sentencing range and the sentence imposed that the Government appeals or a failure on the part of a judge to show that it's considered the guideline sentencing range and the statutory criteria.

So that is the way I expect it will play out in the Court of Appeals, and that's how I think you can reconcile the reasonableness standard with my position.

Now, having said that, there was no objection to the PSR. The GSR was correctly calculated. The low end of that is seven years. Our plea agreement commits us to making that recommendation, and we stand by it. And I think, as the Court pointed out, this Defendant has a very significant record, criminal record in this case, plus the fact that he's come back now twice to this country showing that he's not willing to abide by our immigration laws.

THE COURT: I think, so that you'll know, Mr. Lockhart, I believe that the Government conceded that the first deportation of Mr. Luna was procedurally defective; and so that was not the basis for the charge in this case.

I'm not so sure what happened in that one; but for purposes of sentencing, I'm really not going to take that one into account.

MR. LOCKHART: Okay. So in any event, we stick with our original recommendation of seven years. Thank you.

THE COURT: Okay. Mr. Roy [for the Defendant].

MR. ROY: Thank you, your Honor. Your Honor, in terms of analyzing what the Court has to do, I agree with the Government

that the PSR certainly has a lot of value. A lot of time has gone into implementing the guidelines, and a lot of work goes in by probation in terms of putting a report together.

So I think that the reports are still very, very valuable; but I think in terms of where *Booker* leaves us right now, I think that you have to look at the provision of 18 U.S. Code, Section 3553, that states that the Court shall impose a sentence that is sufficient, but not more than necessary, to punish the Defendant.

There are a litany of different things the Court has to consider, but I think that the Government's position, and the way that Mr. Lockhart would have the Court analyze this, I think would really nullify the *Booker* decision.

If the Court still has to abide by the guidelines and has to perform a departure analysis to go below the guidelines, then really *Booker* means nothing; and that's consistent with what the Government, I think, has done after *Blakely*. For every case I had, they said despite some clarity in the *Blakely* opinion, *Blakely* doesn't apply to the guidelines. And now that the first part of *Booker* says it does, well, if it does apply, it doesn't really apply. We still win no matter what. And I think that that's not how I read *Booker*, you Honor.

So I'm asking the Court to impose the same sentence that it imposed, four years to serve, 48 months. That is still a very substantial sentence for this nonviolent crime.

In terms of analyzing whether or not the guideline, the overall guideline is reasonable, one of the things I thought about when I was looking at the Government's memo, your Honor, is, we started off with Mr. Luna with a 16-level increase for an aggravated felony. He went from 8 to 24.

Parenthetically, Level 24 is the same level the Defendant would be at if he had one prior drug felony, possessed a firearm in connection with another drug dealing offense. That's how huge the 16-level increase is.

And also parenthetically, and I know the Court sees these cases, if Mr. Luna had a firearm and had two prior violent felonies, that would make him a Level 24, two prior drug felonies.

So that's the extent of the increase that the guidelines provided for essentially a nonviolent crime. So I think that to put someone in jail for seven years for a nonviolent crime certainly costs the taxpayers of the United States a great deal of money,

and I think that seven years is more than is necessary for the Court to comply with what Section 3553 requires.

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THE COURT: Mr. Roy, I'd like you to address another consideration, and that is the terms of his incarceration as one who will eventually be surrendered for deportation.

MR. ROY: One thing, you Honor, and I received a memo actually from another inmate at Wyatt yesterday, and I intended to address this, that is inmates that are facing deportation like Mr. Luna have restricted privileges within the Bureau of Prisons.

They are not eligible for, for instance, the 400-hour drug program. They're not eligible for boot camp, for all intents and purposes. And the reason, your Honor, is, the presence of an immigration detainee is a higher security factor, if you will, and I'm certain appropriately; but their incarceration, your Honor, is different than the incarceration of inmates that are – that do not have immigration holds like Mr. Luna.

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MR. ROY: And for those reasons, your Honor, I ask the Court to respectfully impose the 48-month sentence that was imposed last Friday. I think it's reasonable under all the circumstances. Thank you.

THE COURT: Mr. Lockhart, did you want to respond at all?

MR. LOCKHART: Just briefly, your Honor, on that last point first. I believe the First Circuit has held, obviously pre-*Booker*, that the different conditions under which deportable prisoners are incarcerated is not a basis for a downward departure.

THE COURT: A downward departure.

MR. LOCKHART: Right. So I think we should – again, in light of my overall philosophy articulated to the Court, you have to begin from that premise.

Now, we also don't see that factor anywhere in the statutory criteria either of the – I think it's the eight or so factors set forth –

THE COURT: Well, doesn't 3553(a)(2)(D) talk about the need for the sentence imposed to provide the Defendant with educational or vocational training, medical care or other correctional treatment in the most effective manner?

So shouldn't I look at exactly what terms and conditions of confinement Mr. Luna will be facing versus someone who, as Mr. Roy pointed out, is a Level 24 here on a drug and gun charge?

MR. LOCKHART: No, because the remedy that you'd be giving him a more lenient sentence wouldn't provide him with any sort of available educational programs.

In other words, there's a disconnect to our mind between the goal of the Court in providing him with more of the services and the remedy imposed. Lessening his prison term isn't going to give him access to more programs within the prison.

THE COURT: Well, don't I have to read that provision, though, in concert with 3553(a), that is that I should impose a sentence that's sufficient but not greater than necessary to comply with the purposes set forth in Section (2)?

MR. LOCKHART: The answer to that is, you're referring to what the Courts have called the parsimony principle, and Judge Cassell talks about that in his opinion; and Judge Cassell's point, which is our point, is that the Sentencing Commission has taken into account the parsimony principle as well as the other factors in 3553 in arriving at the guideline sentencing range, and this is why it's so important to begin from the premise that that range should control absent an exceptional case.

So, in other words, the Sentencing Commission, which has access to data on reentry offenders and which took into account deterrent issues, the parsimony principle, rehabilitative issues and so forth, said that a sentence of low end, seven years in this case, was appropriate.

And so, again, there would have to be something very uniquely – very unique, rather, to justify a major difference in the sentence based on perhaps some added parsimony that the Court might wasn't to dole out in addition to what the Sentencing Commission has already provided.

THE COURT: Okay.

MR. LOCKHART: And just for the sake of the record, to the extent the Court disagrees with Judge Cassell on the weight to be given the guidelines and thinks that the guidelines are just on factor to be considered and that they're not deserving of considerable or great weight, we'd ask the Court just to clarify for the record what its view is on that question because it seems to me that is the threshold legal question; and because the Court hasn't yet imposed a sentence, we don't know yet whether it's going got be one that we agree with on a reasonableness scale.

THE COURT: Mr. Lockhart, I thank you for coming today

because this issue is one that all of us involved in the system will struggle with over the next several months and maybe years.

The Supreme Court's decision was on that I think no one really anticipated. I think all of us were wagering that perhaps it would be A or B. Instead we got C. And all of us are still, I think, digesting it; and what you will see will be a number of trial judges like myself struggling with what does it mean, what are the rules now.

We have been freed of the binds of the guidelines, and in many respects that makes the job of the sentencing judge all the harder because the sentencing judge now must look at a number of variables, including the guidelines.

I'm not discounting their validity in terms of their now advisory nature; but I think, as you said, we will not know precisely how we should proceed on these matters until the Court of Appeals, and perhaps even the Supreme Court again, has an opportunity to decide some of these cases.

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THE COURT: The Court in this case has the pre-sentence report which, as I said at the beginning o this hearing, sets forth this Defendant's rather substantial criminal history. He has a record of convictions going back to his teen years. He has been sentenced to prison for many of those offenses.

The pre-sentence report also sets forth this Defendant's personal history. He says, and I have no reason to disbelieve him, that he was brought to this country as an infant; and, in fact, he entered the country as a legal permanent resident, according to the pre-sentence report.

He was deported to the Dominican Republic where he has no family, doesn't speak the language and has absolutely no support system. He is, for all intents and purposes, an American. He's lived in this country his entire life with the exception of the short period of time shortly after his deportation.

The guidelines in this case, based on his criminal history and on that 16-level increase required by virtue of the fact of his prior conviction for an aggravated felony, in this case I think it was an assault, put the Defendant in a range of seven years, that is 84 months, to 105 months.

It's a very long sentence even at the low end; and if I were sentencing the Defendant prior to the Supreme Court's decision in

Booker, I would have been required by the law to impose at least the 84 months of incarceration.

Under *Booker*, however, the trial Court is granted some discretion in sentencing. As Justice Breyer wrote under the majority's opinion on remedy, "The sentencing Court is required to consider the guideline ranges, but it permits the Court to tailor the sentence in light of other statutory concerns as well," and the Court directs us to the statute entitled "Imposition of Sentence."

Now, 3553, that is Section 3553 of Title 18, sets forth several factors that a Court must consider in fashioning a sentence in a particular case, that is, with respect to a particular Defendant.

Unlike the law pre-*Booker* where the Court was really constrained by the mandatory nature of the guidelines, in the post-*Booker* era, trial judges must still adhere to the law as Congress has given it to us in Section 3553, but trial judges are also free to utilize judgment and have the ability, as Justice Breyer said, to tailor a sentence, an individualized sentence, that takes into account all the pluses and minuses in that particular Defendant's case.

I start with the statute itself. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)."

I must consider the nature and circumstances of the offense and the history and characteristics of the Defendant. Well, in this case I have essentially a nonviolent felony. On the other had, I have a Defendant who has been no angel. He's committed several offenses for which he has been sentenced to various terms of imprisonment and probation.

And looking at his individualized characteristics, I see someone who has been in this country since infancy and who originally came here legally, and what I don't know is why his parents never saw fit to have him naturalized; but as I said earlier, because of the length of time that he has remained in the United States, he is effectively an American. And so I don't think anyone should be surprised that he came back. We sent him to a place as foreign to him as the moons of Saturn would be to any of us who is lucky enough to claim American citizenship.

And so, as he says, he slept in cemeteries and lived out of garbage barrels because he doesn't speak the language and he doesn't have any support system or family in the Dominican

Republic.

It shouldn't be a surprise that he came back. After all, how many people from the Dominican Republic want to go back? The only way they seem to go back from the United States is if they've been deported, and so it's not surprising that this Defendant came back.

I look at paragraph (2) of Section 3553(a), and that requires the Court to look at the need for the sentence to reflect the seriousness of the offense, to promote respect for the law and to provide a just punishment for the offense. As I have said here, this is essentially a nonviolent offense.

This Defendant now knows that he can never come back to the United States and that if he does, he will be sent to prison.

I must consider whether or not the sentence I impose will afford an adequate deterrence, whether it will protect the public from further crimes. Again I say this is a nonviolent offense.

And finally, I look at paragraph (2)(D) that talks about the need to provide the Defendant with educational or vocational training, medical care or other correctional treatment in the most effective manner; and I think here that the Court may take into account the length of the incarcerative sentence to be imposed because, after all, the length of the sentence is a function of how those items will be addressed, in particular with someone who's going to be deported at he conclusion of the sentence.

The kinds of sentences available. Well, the Government has correctly pointed out to the Court that I do not have the authority to suspend any portion of an incarcerative sentence. So I'm limited to a sentence of probation or a term of imprisonment.

And finally, the kinds of sentences and sentencing range established by the sentencing guidelines. Here, that range calls for an incarcerative term of at least seven years or as much as 105 months.

Paragraph subsection (6) talks about the need to avoid unwarranted sentence disparities among Defendants with similar records who have been found guilty of similar conduct, and paragraph (7) is really not applicable here. It talks about restitution.

As I read *Booker* and as I read Section 3553, the sentencing Court has an obligation to take all of those factors into account, not giving any one any particular weight, but take them all into

account in looking at the human being who sits in this courtroom who is the subject of the sentence I'm about to impose.

In this case, taking all of the facts that I mentioned earlier into account, I find that an incarcerative terms of four years is sufficient to carry out the objectives of Section 3553 without being a sentence that's greater than necessary to carry out those objectives.

Four years is a very long time in anyone's life. For this Defendant, it will mean that he will have period of time to adjust to the fact that he's going to be deported, it will give him an opportunity, hopefully, to learn Spanish well enough that he can get along when he's sent back to the Dominican Republic, that he can perhaps educate himself as to what job prospects he might have in that country and hopefully as well to gain some job training so that he can successfully integrate into the society of the Dominican Republic. After all, what we really want to achieve here is to keep him out of the United States.

I find that a sentence at the low end of the guideline range here, seven years, is greater than necessary to effectuate those goals of sentencing. And so I have decided here not to impose a sentence within that guideline range as the Government has argued.

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